Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

(3)

No. 91-1370

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

---

MABEL A. KING,
*Petitioner,*

v.

WALTER B. RIDLEY, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITIONER'S REPLY BRIEF

---

ROGER E. WARIN
(Counsel of Record)
JERALD S. HOWE, JR.
SHARON I. BLOCK
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6280
*Attorneys for Petitioner*

March 31, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS *


| | Page |
|---|---|
| ARGUMENT | 1 |
| CONCLUSION | 8 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *City of Burlington v. Dague*, No. 91-810, *cert. granted* (U.S. Jan. 27, 1992) | *passim* |
| *Hensley v. Eckerhart*, 461 U.S. 424 (1983) | 6 |
| *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) | 4 |
| *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988) | 8 |


* The parties to the proceeding below were the Petitioner, Mabel A. King, and the Respondents, James F. Palmer, Director, District of Columbia Department of Corrections, and the District of Columbia. Mr. Ridley has succeeded Mr. Palmer in office.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

No. 91-1370

---

MABEL A. KING,

*Petitioner,*

v.

WALTER B. RIDLEY, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITIONER'S REPLY BRIEF

---

### ARGUMENT

Respondents concede in their Brief in Opposition that "the issue presented by this case—whether risk enhancement is available under the typical fee-shifting statute—should be reviewed by this court." Opp. at 1. By agreeing with petitioner that the issue presented is important enough to warrant review by this Court, respondents have narrowed the question presented by the Petition to a simple one. That question is whether the Court should review this important issue solely in the context of the record in *City of Burlington v. Dague*, No. 91-810, or also should have the benefit of the far more fully developed factual record available in *King v. Palmer*, No. 91-1370.

1. Respondents argue that the factual submissions in this case are irrelevant because the Court of Appeals in *King* ruled—according to respondents, correctly so—that risk enhancement is not available as a matter of law. Opp. at 2. But this position that the factual context of the case is irrelevant *presupposes* that this Court will affirm the Court of Appeals' decision that risk enhancement is *never* available. If this Court were to conclude otherwise, and to rule that risk enhancement is *sometimes* available under statutes providing for a "reasonable" attorney's fee, then the Court would obviously be required to establish the appropriate standard or standards for such risk enhancement.

Because the statutory standard is one of reasonableness, the legal question presented is a very practical one. Only with a full appreciation for the realities of the marketplace for legal services will the Court be able to set sound and workable standards for risk enhancements that are based on the realities of contingent fee practice. *See* Pet. at 23. The difficulties that the courts have had in handling this issue in the past counsel caution: future rules in this area should be crafted based only on the fullest possible understanding of the marketplace. If the Court decides to find as a matter of law, as it has found in the past and should continue to find, that risk enhancements are available in appropriate circumstances (*i.e.*, when the market requires such an enhancement as part of a reasonable fee), the quality of the factual record will be far from irrelevant. In such an event, the factual context will be a crucial tool for developing workable standards.

2. The respondents also argue in their Opposition (and in their *Amici Curiae* brief filed in *Dague*) that the difference in the quality of the factual records in *Dague* and *King* is indistinguishable for the purpose of deciding

the question presented.[1] The difference in quality of the two records, however, is substantial. The issue of risk enhancement was a peripheral one in *Dague* and, consequently, the record on the issue is relatively thin. The plaintiff in *Dague* submitted only five affidavits on the issue of risk enhancement, two of which came from the attorneys who represented the plaintiff. Respondents themselves have taken the position that the factual record in *Dague* is inadequate.[2] The record in *Dague* is sufficient to justify the decision in that case, but it is far from ideal as a record for review of the important issue presented here.

*King* offers the Court a rich factual record upon which to decide the issue presented. The question of risk enhancement was a central issue in this litigation. As a result, extensive opinions below are devoted almost exclusively to the risk enhancement issue. Pet. App. 1a-128a. Furthermore, scores of affidavits are found in the record below from many different sources, including: (1) counsel in the underlying case; (2) other lawyers, specifically regarding this case; (3) local Title VII and employment law lawyers; (4) lawyers who practice in other areas of complex federal litigation in the District of Columbia, sometimes on a contingent fee basis; and (5) *pro se* plaintiffs in similar cases, who were turned down in seeking competent counsel on a contingency basis.[3] The affiants represent almost every facet of the

---

[1] Opp. at 2; *see Dague*, No. 91-810, Brief of *Amici Curiae*, the District of Columbia and Several of the States, In Support of Reversal at 17.

[2] *See Dague*, No. 91-810, Brief of *Amici Curiae*, the District of Columbia and Several of the States, In Support of Reversal at 21 (submitted by lead counsel for respondents in *King*) ("The Dague affidavits are utterly insufficient . . . .").

[3] All of these affidavits are contained in the Joint Appendix below which was lodged with the Court when the petition for certiorari in *King* was filed on February 21, 1992.

legal practice—large firms, solo practitioners, partners, associates, and public interest practitioners—and a significant part of the District of Columbia bar.

Also significant is the fact that these affidavits specifically and effectively address the two factors made relevant under Justice O'Connor's concurrence in *Delaware Valley II*: (1) "how a particular market compensates for contingency" and (2) whether the individual plaintiff " 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 733 (1987) (citation omitted). The record provides exactly the type of market-oriented, empirical evidence that Justice O'Connor's test requires to make an accurate determination. All of the evidence in this case is that lawyers who take contingent fee cases in the District of Columbia require at least 100 percent risk enhancement as an inducement to take such cases. *See* Pet. at 7, 11-13 & nn. 10-12.

3. Because of the limited amount of empirical evidence in the record in *Dague*, those submitting briefs in that case have already built their arguments, in large part on sweeping assertions about how the legal services marketplace works—assertions that are entirely unsubstantiated and grossly inaccurate. For example, the Washington Legal Foundation asserts in *Dague* that "there is no shortage of lawyers willing to take their cases on a non-fee-paying basis."[4] The record in *King* refutes this bold generalization with concrete, empirical evidence, by documenting the reluctance on the part of lawyers to take cases on a contingent fee basis and the difficulty experienced by plaintiffs who cannot afford any other arrangement. *See* Pet. at 7-13 & nn. 7-12.

---

[4] *Dague*, No. 91-810, Brief of the Washington Legal Foundation and the Allied Education Foundation as *Amici Curiae* in Support of the Petitioner at 17.

The United States, in its *Amicus Curiae* brief in *Dague*, also makes broad generalizations, unsupported by any facts. The brief states without support that "a contingency enhancement over the lodestar is not necessary to enable a plaintiff with a case involving a fair chance of success to obtain competent counsel." [5] As demonstrated in the *King* record, this assertion is not true, at least in the District of Columbia.

Likewise, the petitioner in *Dague* declares as an absolute that "compensation at a reasonable hourly rate for all hours worked will be sufficient to attract competent counsel . . . ." [6] The numerous affidavits submitted in *King*, in which the affiants attest that a reasonable hourly rate which would attract them to a fee-paying client is not sufficient to attract them to a contingent fee client, refute petitioner's assertion. *See* Pet. at 11-13 & nn. 10-12.

Those opposing risk enhancement also attack the reliance of petitioner, in accordance with conventional practice in the attorney's fees field, on affidavits by counsel and other litigating lawyers. Respondents assert flatly that attorney affidavits "are not sufficient . . . to discharge whatever burden this Court may impose on prevailing plaintiffs to show that risk enhancement is necessary to ensure that they were able to secure counsel." Opp. at 2 (citation omitted). Similarly, *amici* in *Dague* maintain that affidavits submitted in risk enhancement cases are based on "hypothetical circumstances long since past" and, therefore, are "never valuable." [7] The affidavits submitted in *King*, however, are not based on hypotheticals: they are based on the actual experience of a cross-section of the Washington legal market.

---

[5] *Dague*, No. 91-810, Brief for the United States as *Amicus Curiae* Supporting Petitioner at 17.

[6] *Dague*, No. 91-810, Brief for Petitioner at 18-19.

[7] *Dague*, No. 91-810, Brief of the Washington Legal Foundation and the Allied Educational Foundation as *Amici Curiae* in Support of the Petitioner at 17.

Evidence of the case intake and billing practices of litigating lawyers is absolutely essential to what is "reasonable" in the way of risk enhancement under the many fee-shifting statutes that adopt the reasonableness standard. When the working of the financial services marketplace is at issue, it is logical to look in large part to financial institutions for evidence of their economic behavior. When agricultural markets are at issue, it is sensible to look to farmers for such evidence. There is no reason it should be any different for legal services and lawyers. Trial judges are perfectly capable of assessing the credibility and weight of attorney affidavits in this area, just as they handle a multitude of other types of economic evidence.[8] In truth, what respondents and others resist is the *empirical conclusion* that is dictated by the evidence as to the legal services market, as found by the trial court below and many others across the Nation: that the prospect of significant risk enhancement *is* often necessary as an inducement to lawyers to take on cases on a contingent fee basis. The unrebutted record in this case illustrates this basic economic reality.

The Court should not have to depend on visions—created in a vacuum—of how the legal market works. In deciding the legal issue here presented, the Court should have before it a full and accurate description of the world of contingent fee practice, as is available in the *King* record.

4. The respondents, in their Opposition, ask this Court to dismiss the extensive record compiled in *King* showing the difficulty that plaintiffs have obtaining competent counsel on a contingent fee basis, simply because Mrs. King was able to obtain counsel without a guarantee of

---

[8] Perhaps respondents would prefer to place on prevailing plaintiffs the burden of obtaining formal econometric studies of the marketplace for legal services. But the empirical data for such studies would still come largely from lawyers. In addition, there is no reason to go to such lengths and expense. As this Court has held, a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

risk enhancement. Opp. at 2. Respondents' argument, however, distorts the facts. Robert Adler, Mrs. King's counsel in the underlying litigation, relied on the possibility that if Mrs. King prevailed, the trial court might award a risk enhancement. In fact, Mr. Adler stated in his affidavit that he would not have accepted the representation without the prospect of a fee enhancement. *See* Pet. at 7.

Furthermore, the record in *King* contains affidavits from many sources other than Mr. Adler that support the petitioner's contention that contingent fee plaintiffs have substantial difficulty obtaining counsel for cases like Mrs. King's. For example, the record contains the affidavits of six Title VII attorneys who stated that they would not have taken Mrs. King's case on a contingent fee basis if she had approached them in 1983. *See* Pet. at 8-10. The record also contains the affidavits of attorneys who will no longer accept contingent fee cases absent the possibility of risk enhancement, and of legal services representatives who attest to the difficulty they have in finding representation for meritorious claims because of the risk of non-payment in contingent fee cases. *See* Pet. at 8, 10-11. Finally, the record also contains the affidavits of a dozen Title VII plaintiffs who were forced to proceed *pro se* because they could not find counsel who would accept their cases on a contingent fee basis. *See* Pet. at 10 & n.9.

5. Finally, the respondents claim to have found a "significant and telling" error in the petition. Opp. at 2. The supposed error lies in the fact that the petition endorses all of the trial court's rulings on the evidence, while also endorsing the D.C. Circuit's panel decision to award a hundred percent enhancement instead of the fifty percent enhancement awarded by the trial court. This accusation of error is undermined by a careful reading of the D.C. Circuit panel decision. Obviously, the petitioner did not agree with the trial court's decision to award only a fifty percent enhancement. However, this

error of the district court in limiting enhancement to fifty percent was one of law, not fact. As explained in the D.C. Circuit panel decision, the trial court misapplied the holding in *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988):

> [The trial court's] error, however, was in applying different levels of enhancement to fully and partially contingent cases. . . . Although the *Palmer* court's calculations of attorney's fees are difficult to discern, it appears to us that it actually awarded an enhancement of 100 percent of the *contingent portion* of the fees—precisely the enhancement urged by King—even though the court referred to a fifty percent enhancement for partially contingent cases.

Pet. App. 57a. As demonstrated by the D.C. Circuit panel decision, the trial court's mistake was clearly one of law. Therefore, it is not inconsistent for the petition to endorse the trial court's factual rulings and the D.C. Circuit panel ruling as to the correct interpretation of the holding in *Palmer v. Shultz*. The facts of this case fully support an award of 100 percent risk enhancement.

## CONCLUSION

For these reasons a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, and this case should be consolidated with *City of Burlington v. Dague*, No. 91-810, for consideration on the merits.

Respectfully submitted,

ROGER E. WARIN
(Counsel of Record)
JERALD S. HOWE, JR.
SHARON I. BLOCK
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6280

*Attorneys for Petitioner*

March 31, 1992